IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-625

DENNIS JOHN LEWIS,
a/k/a Richard Kennedy, *Petitioner*

v.

GREYHOUND LINES-EAST, *et al.*, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question raised is the threshold issue of whether Petitioner set forth facts sufficient to show that the Respondent Union acted discriminatorily, arbitrarily or in bad faith and, therefore, whether the Union breached its duty of fair representation.

STATEMENT

The facts of this case are adequately set forth in the Opinion of the District Court (Petitioner's Appendix C).

ARGUMENT

Actions by employees under 29 U.S.C. §185 clearly require the District Court to determine whether a union has breached its duty of fair representation in an infinite number of situations. In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court set forth guidelines on the meaning of such a breach, and it has not and should not utilize its discretionary jurisdiction to review the application of those guidelines in any and all cases.

In the instant case, the courts below found that the petitioner did not make a preliminary showing of facts from which one could conceivably infer that Respondent Union's actions were arbitrary, discriminatory or in bad faith. The facts are narrow and limited to the case at hand. The fact that petitioner is unhappy with the decision does not transform the issue into one meriting the granting of a Writ of Certiorari.

There is no basis to the contention that the decision below conflicts with *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). In *Hines*, the Court was not called upon to review the lower court's finding of a breach of the duty of fair representation. The issue before the Court was

whether the employer was properly dismissed as a defendant because of the finality of the arbitrator's award despite the finding of a breach by the Union. The Court held that the employer was not properly dismissed and that a breach by the Union which taints the arbitration process permits review of the arbitration itself. The opinion of the court below that no breach by the Union occurred does not conflict with *Hines*.

There is no question that the opinion below does not conflict with *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), either. That case set forth the parameters for the court review of an arbitration award when challenged by a union. It contains no reference to the duty of fair representation, nor to conduct which amounts to a breach of that duty. Respondent Union is disinterested in Petitioner's implied and unsubstantiated contention that Petitioner can challenge the arbitration award, in the absence of a breach by the Union. If he can, the case against the Union should still have been dismissed. Errors in the arbitrator's award are not grounds for an action against the Union.

Even if a flaw in the arbitrator's award would give rise to some heretofore unrecognized cause of action against the Union, despite fair representation by the Union, the flaw petitioner alleges does not exist. The record is incomplete on this matter, as petitioner never raised the issue of the failure of all three arbitrators to sign the arbitration opinion prior to his Petition for Rehearing before the United States Court of Appeals. Only after the issue was raised in Judge MacKinnon's dissenting opinion, was petitioner heard to allege that a procedural flaw existed.

The fact of the matter is that the arbitration opinion was signed by all three members of the panel. A clerical error caused the filing of an unsigned copy with the District Court. Copies signed prior to June 25, 1975, by all three arbitrators can be provided. It is the normal practice in labor arbitration for the neutral arbitrator to write the award and opinion and for the arbitrators picked by the parties to simply affix their signature afterwards.

CONCLUSION

The decision below conflicts only with the dissenting opinion of Judge MacKinnon (Petitioner's Appendix 6A). A conflict between a majority opinion and a dissenting opinion is not very surprising and is certainly not a basis for granting certiorari.

Respectfully submitted,

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